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SUPREME COURT
of the
UNITED STATES OF AMERICA

October Term, 1982
No. _____

RAYMOND FERREN,

Petitioner,

vs

CHRISTEN BRUN HENRICHSEN,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California and to the California Court of Appeal, 2nd District, Division III

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QUESTIONS PRESENTED

1. Is Calif. Code of Civil Procedure § 437c, as interpreted and applied by the California Court of Appeal below, an unconstitutional and invidious discrimination against civil litigants involved in attorney malpractice actions?

2. Is Calif. Code of Civil Procedure § 437c, as interpreted and applied by the California Court of Appeal below, an unconstitutional deprivation of a litigant's right to due process, vis-a-vis the right to trial and cross-examination of adverse witnesses?

3. May California Courts expand upon the use of a summary judgment motion, as contained in California Code of Civil Procedure, § 437c, to selectively dispose of all factual issues relating to a civil suit for attorney malpractice, without violating a litigant's 14th Amendment due process right to trial?

CERTIFICATION AS TO INTERESTED PARTIES

The undersigned Petitioner, certifies that the following listed parties have an interest in the outcome of this case. These representations are made to enable justices of the Court to evaluate possible disqualifications or recusal.

There are no other interested parties other than those named in the caption of this case and their attorneys of record.

John Brown
Member of the Bar
United States Supreme Court

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

RAYMOND FERREN,

Petitioner,

vs

CHRISTEN BRUN HENRICHSEN,

Respondent.

PETITION FOR A WRIT OF CETIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND TO THE CALIFORNIA COURT OF APPEAL, 2nd DISTRICT, DIVISION III

The petition of Raymond Ferren, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the California Court of Appeal, 2nd Appellate District, Division III, filed June 2, 1982, and affirmed on June 24, 1982, in a denial of a Petition for Rehearing; and to review the Judgment of the California Supreme Court denying Petitioner's Petition for Hearing in that Court by a Minute Order dated July 28, 1982.

OPINION BELOW

The Opinion of the California Court of Appeal appears in the Appendix hereto and was not published in the California Official Reports. A Petition for Rehearing was denied on June 24, 1982, pursuant to a "postcard" minute order found in the Appendix. The Minute Order of the California Supreme Court denying the Petition for Hearing appears at 32 Cal.3d 12 (Minutes), of the California Official Reports, No. 22 (August 17, 1982).

JURISDICTION

The California Court of Appeal's judgment was entered June 2, 1982, and affirmed on June 24, 1982, in an order denying a Petition for Rehearing. A Petition for Hearing was filed in the California Supreme Court and denied on July 28, 1982, which is the date the contested judgment became final.

Petitioner invokes the jurisdiction of this Honorable Court pursuant to 28 USC § 1257 (3) and Rule 17.1(b) & (c) of the Supreme Court Rules, on the ground that California's summary judgment procedure (Code of Civil Procedure § 437c) violates the due process and equal protection clauses of the 14th Amendment of the U.S. Constitution.

QUESTIONS PRESENTED

1. Is Calif. Code of Civil Procedure § 437c, as interpreted and applied by the California Court of Appeal below, an unconstitutional and invidious discrimination against civil litigants involved in attorney malpractice actions?

2. Is Calif. Code of Civil Procedure § 437c, as interpreted and applied by the California Court of Appeal below, an unconstitutional deprivation of a litigant's right to due process, vis-a-vis the right to trial and cross-examination of adverse witnesses?

3. May California Courts expand upon the use of a summary judgment motion, as contained in California Code of Civil Procedure, § 437c, to selectively dispose of all factual issues relating to a civil suit for attorney malpractice, without violating a litigant's 14th Amendment due process right to trial?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. United States Constitution, 14th Amendment, § 1, provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

B. California Code of Civil Procedure, § 437c, provides in material part as follows:

> "Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense thereto. . .
>
> The motion shall be supported or opposed by affidavits, declarations, admissions, answers to interrogatories, depositions and matters of which judicial notice shall or may be taken. Evidentiary objections, not raised here in writing or orally at the hearing, shall be deemed waived.
>
> Such motion shall be granted if all the papers submitted show that there is no triable issue as to

any material fact and that the moving party is entitled to judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from such evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from such evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact."

CONSTITUTIONAL QUESTIONS RAISED BELOW

Petitioner's requested rehearing with the California Court of Appeal, and his Petition for Hearing filed with the California Supreme Court, raise a number of constitutional issues regarding whether California's summary judgment procedure (Code of Civil Procedure §437c) may be used as a substitute for trial without violating the due process clause of the 14th Amendment. This appeal also raises the issue of whether a trial court may use a summary judgment procedure to resolve factual disputes regarding the tolling of a statute of limitations in a malpractice action, without violating the equal protection clause of the 14th Amendment and discriminating against an identifiable class of litigants prosecuting attorney malpractice actions.

NATURE OF THIS CASE

This was an attorney malpractice suit brought by Petitioner (client) against Respondent (Petitioner's prior attorney), relating to an attorney's fraud and malpractice in representing his client in a California marital dissolution proceeding. Petitioner's complaint was premised on the contention that the fraudulent concealment of Respondent's malfeasance tolled the 2-year statute of limitations. (Calif. Code of Civil Procedure §339(l))

Pursuant to Calif. Code of Civil Procedure §437c, respondent filed a pretrial summary judgment with the Ventura County Superior Court, contending that no triable factual issues existed as to the malpractice claim and statute of limitations defense. This motion was controverted by declarations, documents, and Respondent's own billing records, highlighting a number of factual issues relating to Respondent's malpractice and fraudulent concealment.

On October 30, 1980, the Ventura County Superior Court granted Respondent's summary judgment motion, yet failed to make any findings regarding the basis for the judgment. This summary judgment was later affirmed on appeal, by the California Court of Appeal, 2nd Appellate District, thereby depriving Petitioner of any opportunity for trial.

STATEMENT OF FACTS

Petitioner's appeal relates to an attorney malpractice action, in which Respondent represented Raymond Ferren in a dissolution proceeding. On June 15, 1972, Petitioner, Raymond Ferren, was served with a petition for marital dissolution and order to show cause in a dissolution action instituted by his meretricious wife, Glena Ferren. Petitioner retained Respondent, Christen Henrichsen, as his attorney on June 16,1972.

During the initial interview, Mr. Henrichsen was informed of Petitioner's meretricious relationship with Glena Ferren. Glena Ferren had been previously married to Earl Ewers, Jr., and attempted to secure an invalid Mexican divorce on November 7, 1955. Twelve days later, Petitioner and Glena married in Las Vegas, Nevada. Raymond Ferren later applied for veteran's benefits, and his application was denied based on an April 11,1956, Veteran's Administration finding that Glena's Mexican divorce was invalid.

In representing Petitioner, Mr. Henrichsen made a general appearance and filed a response to the dissolution petition and OSC. Petitioner later discovered that this general appearance procedurally waived any opportunity to challenge Glena's jurisdictional status under the California Family Law Act, since Respondent had failed to file a motion to quash the summons and petition. (Calif. Civil Code §4401, et. seq.; Calif. Rules of Court, Rules 1230,

1232,1234) As a result of this procedural estoppel, temporary orders for spousal support were immediately imposed. Respondent was ultimately discharged on May 17, 1973, and Petitioner was forced to enter into a property settlement agreement and default judgment for spousal support, attorney's fees, and property division.[1]

Petitioner did not learn of his attorney's negligence until July, 1975, when he first discovered the procedural ramifications of such a general appearance. On May 10, 1977, Petitioner filed a complaint against Respondent for breach of written contract, malpractice, and fraud. Respondent filed a second amended answer alleging a statute of limitations defense.

On August 5, 1980, Respondent filed a motion for summary judgment (Calif. Code of Civil Procedure §437c) contending that: the malpractice action was strictly a question of law for the court to decide; the breach of contract and negligence actions were barred by the statute of limitations; and the prior dissolution action collaterally estopped Petitioner from suing for attorney malpractice. Petitioner opposed the summary judgment motion with declarations and exhibits establishing: the existence of a written contract; Respondent's negligence and failure to meet the

1. Petitioner appealed from the final judgment of dissolution in **Ferren v. Ferren,** Court of Appeal, Second Appellate District, 2nd Civ. No. 47321 (August 10, 1976). It was determined that Petitioner's general appearance procedurally estopped him from contesting Glena Ferren's capacity to sue, or the court's lack of subject matter jurisdiction.

community standards expected of an attorney; and a declaration outlining Petitioner's initial July, 1975 discovery of the malpractice and fraud.

Respondent's summary judgment motion was granted on October 30, 1980, by the Ventura County Superior Court, although the minute order contained no findings as to the basis for the Court's ruling. The November 24, 1980, formal order granting Respondent's summary judgment was likewise silent as to the legal basis for such a summary judgment.

In affirming the summary judgment, the California Court of Appeal, Second Appellate District held as a matter of law, that Petitioner's action was barred by the two-year statute of limitations (Code of Civil Procedure §339(1)). The court further found that this limitations period was not tolled because Petitioner had failed to show - in a summary judgment proceeding - that his failure to make an earlier discovery was reasonable or justifiable.

IMPORTANCE OF THIS CASE

This case involves the procedural question of whether California's summary judgment prodecure (Calif. Code of Civil Procedure §437c), may be used by a trial court to preclude the trial of factual issues relating to an attorney

malpractice claim and a client's later discovery of the malpractice. California trial and appellate courts are currently using this pretrial, summary judgment procedure to determine disputed factual issues involving malpractice claims and a client's "probable" date of discovery for purposes of any statute of limitations defense. There are now pending in the California courts, a great many malpractice cases which are being "pre-tried" by such a summary judgment procedure. Each of these cases involve similar questions regarding the constitutionality of Calif. Code of Civil Procedure §437's summary judgment procedure.

REASONS FOR GRANTING THIS WRIT

1. Section 437c of the California Code of Civil Procedure - as construed and applied by the California Court of Appeal - is an unconstitutional deprivation of Petitioner's right to trial, as guaranteed by the due process clause of the 14th Amendment of the U.S. Constitution. The Court's procedural use of such a summary judgment procedure in the resolution of all factual and legal issues involving a malpractice claim, invidiously discriminates against a class of litigants who have instituted attorney malpractice actions, thereby violating the equal protection clause of the 14th Amendment.

Petitioner contends that the Court of Appeal has unconstitutionally used this summary judgment procedure as an arbitrary procedure for the disposal of all factual and legal issues involving a suit for malpractice. Although the statute makes no distinction between malpractice actions and other civil suits, the court's construction has singled out only those civil litigants involved in an attorney's malpractice suit. Regardless of how a trial or appellate court construes the merits of a case, any precept of procedural due process requires that disputed factual issues be decided by a jury after a full presentation of the evidence. **Ishmael v. Millington**(1966) 241 Cal.App.2d 520,525, 50 Cal. Rptr.592.

Although California's summary judgment procedure envisions a pretrial inquiry as to the "existence" of triable factual issues, the Court of Appeal has extended this process to consider malpractice and tolling issues to be purely legal questions. California's summary judgment procedure was never intended to be a "mini-trial" whereby all factual disputes are submitted and tried by affidavit. In affirming the summary judgment, the Court of Appeal found as a matter of law, that Petitioner's civil claims were forever barred by the 2-year statute of limitations contained in Calif. Code of Civil Procedure §339(1). As a procedural consequence of this finding, Petitioner was denied all due process rights to a jury trial, subpoenaed witnesses, and opportunity to confront and cross-examine

those defense witnesses who submitted declarations to the trial court.

In affirming the summary judgment, the Court of Appeal held that Petitioner's "suspicions" about his attorney's conduct and performance, was tantamount to actual notice of the malpractice. The court refused to consider how evidence of fraudulent concealment raised any triable issue regarding the tolling of a statute of limitations.

Disputed questions involving fraud and malpractice claims cannot be procedurally resolved in a summary judgment proceeding. California courts have liberally construed Calif. Code of Civil Procedure §339(1)'s tolling provisions in a number of areas relating to an attorney's omission of a pension plan from dissolution judgment. **Marriage of Brown** (1976) 15 Cal.3d 838, 126 Cal.Rptr. 633, 544 P.2d 561; **Smith v. Lewis** (1975) 13 Cal.3d 349, 118 Cal.Rptr. 621, 530 P.2d 589; **Parker v. Morton** (1981) 117 Cal.App.3d 751, 173 Cal.Rptr. 197. There was nothing in the instant case to suggest that Respondent's pleading error was distinguishable from any of the above cases.

Aside from noting the existence of factual issues relating to this tolling problem, the Court of Appeal judgment went one-step further to make the evidentiary finding that client discovery of the fraud and malpractice **should have occurred** at some earlier date. A court's summary judgment powers cannot constitutionally be expanded to assume the function of a trier of fact, simply because a civil complaint alleges attorney malpractice. **Eagle Oil & Ref. Co. v. Prentice** (1942) 19 Cal.2d 553, 556, 122 P.2d 264; **Jos. Schlitz Brewing Co. v. Downey Dist.** (1980) 109 Cal.App.3d 908, 916-917, 167 Cal.Rptr. 510.

By expanding upon its own summary judgment powers, the Court of Appeal has purposefully discriminated against an identifiable class of litigants who have filed civil actions for attorney malpractice.

Petitioner's complaint for legal malpractice, breach of contract, and fraud may not be summarily dismissed on a court's idle speculation about when or how a lay person might have discovered his own attorney's negligence. Given the factual conflicts regarding the nature of Respondent's malpractice and Petitioner's belated discovery of the fraud and negligence, neither the trial court nor the Court of Appeal could decide these factual issues without precipitating a complete forfeiture of Petitioner's right to trial.

"". . .It never could have been, or in justice ought to have been the intention of those who framed our Practice Act and rules thereunder that the decision of such a serious question as this should be flung off on a motion for summary judgment. **McComsey v. Leaf,** supra, at p. 137.) It must be remembered that on this type of motion plaintiff is not required to prove defendant's negligence. He is only required to show that an issue of fact exists. "The summary judgment statute was not intended nor can it be used as a substitute for existing methods in the trial of issues of fact." If there is any "doubt as to the propriety of this motion, courts should, without hesitance, deny the same,""

Whaley v. Fowler (1957) 152 Cal.App.2d 379,383,313 P.2d 97

Although California appellate courts have construed this summary judgment procedure to be a "drastic remedy," **(Buffalo Arms, Inc. v. Remler Co.** (1960) 179 Cal.App.2d 700, 703, 4 Cal. Rptr. 103, only two lower appellate courts have ever considered its constitutionality. **(Bank of America Nat. Trust & Sav. Ass'n v. Oil Well Supply Co. of Cal.** (1936) 12 Cal.App.2d 26, 55 P.2d 885; **Cowan Oil & Refining Co. v. Miley Petroleum Corp.** (1931) 112 Cal.App.Supp. 733, 295 P. 504. The due process inconsistencies of such a procedure have become acutely pronounced, given the fact that

California courts have adopted varying standards of "issue determination" based on whether the civil complaint contains a cause of action for malpractice. Rather than engage in a process of "issue finding," (**Walsh v. Walsh,** 18 Cal.2d 439, 441, 116 P.2d 62), this pretrial motion has become a substitute for trial, should the complaint ever allege attorney malpractice.

The courts' construction of this summary judgment procedure has culminated in the deprivation of all liberty and property interests asserted by a civil litigant in a malpractice proceeding. **Board of Regents v. Roth** (1972) 408 US 564, 577-579, 33 L.Ed.2d 548,561-562, 92 S.Ct. 2701, 2703. Such a procedural mechanism, when designed to forfeit Petitioner's very opportunity for trial, is particularly problematic when the court's judgment and findings are "opaque and unilluminating as to either the relevant facts." or the law which resulted in the summary judgment. **Carter v. Stanton** (1972) 405 U.S. 669,671, 31 L.Ed.2d 569, 572, 92 S.Ct. 1232, 1234.

SUMMARY AND CONCLUSION

It is respectfully submitted that the California Court of Appeal erred by selectively discriminating against litigants such as Petitioner and using this summary judgment procedure to forfeit all opportunities for trial and the cross-examination of witnesses. The procedural context of

this case implicitly raises the constitutionality of such a summary judgment process, vis-a-vis the due process and equal protection clauses. Although California courts entertain the filing of malpractice claims, this statutory construction has deferred all triable factual issues to a judge's speculation about "probable" notice and discovery. By arbitrarily singling out malpractice actions, the Court of Appeal has used and applied the summary judgment procedure against any litigant seeking civil damages for an attorney's malpractice. **Smith v. Goguen** (1974) 415 U.S. 566, 39 L.Ed.2d 605, 94 S.Ct. 1242; **Slochower v. Board of Higher Education** (1956) 350 U.S. 551, 100 L.Ed. 692, 76 S.Ct. 637. The discriminatory effect of such a pretrial procedure, arises solely because the California courts choose to use the summary judgment proceeding rather than a trial, to resolve and dispose of all attorney malpractice claims. **Yick Wo v. Hopkins** (1886) 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220.

If a summary judgment hearing is statutorily designed to only "discover" factual issues relating to a malpractice action or tolling problem, a court cannot usurp the role of a jury to dispose of these same issues as a matter of law. This decision was particularly onerous since no California appellate opinion has discussed how such a malpractice and tolling issue should be considered in the context of a summary judgment motion. **Neel v. Magana, Olney, Levy Cathcart & Gelfand** (1971) 6 Cal.3d 176, 194, 98 Cal. Rptr. 837, 491 P.2d 421. Due process requires that

litigants in a malpractice action, be afforded the same procedural parity and trial opportunities enjoyed by any other civil litigant.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the California Court of Appeal, Second District, Division Three, and to review judgment of the California Supreme Court denying a hearing.

Dated this 27th day of September, 1982.

Respectfully submitted,

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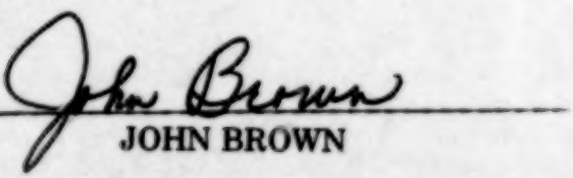
by 
JOHN BROWN

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

2d Civil No. 62286

Ventura County Superior Ct.
No. 65291)

COURT OF APPEAL-SECOND DIST.
FILED
JUN2-1982
CLAY ROBBINS,JR. Clerk
Deputy Clerk

RAYMOND FERREN,

Plaintiff and Appellant,

v.

CHRISTEN BRUN HENRICHSEN,

Defendant and Respondent.

APPEAL from a judgment of the Superior Court of Ventura County. Steven J. Stone, Judge. Affirmed.

John Brown for Plaintiff and Appellant.
Ritner and Wong and William B. Ritner for Defendant and Respondent.

Plaintiff Raymond Ferren (Raymond) appeals from a summary judgment for defendant in an action alleging breach of contract, legal malpractice and fraud in the rendering of legal services in a prior marriage dissolution proceeding.

Raymond was served with a petition and order to show cause on June 15, 1972, in the said marriage dissolution action entitled **In re the Marriage of Petitioner: Glena Ferren and Respondent: Raymond W. Ferren,** Ventura County Superior Court, no. D64058. He retained defendant Henrichsen (Henrichsen) on June 16, 1972, pursuant to an oral agreement. Defendant prepared and filed a response to the petition asking that the marriage be declared a nullity, that spousal support not be awarded, and seeking custody of the children and award of attorney's fees to Raymond.

Points and authorities filed in support of Raymond's response alleged that Glena's prior marriage was purportedly dissolved by a Mexican decree of divorce dated November 7, 1955, in which proceedings neither Glena nor her former husband ever personally appeared in Mexico, and that both were domiciled in and residents of the State of California at the time the purported decree was obtained.

In connection with the dissolution and at the hearing on the order to show cause on August 11, 1972, a letter dated April 11, 1956, from the Veterans Administration to Raymond was admitted in evidence reflecting that an educa-

tional allowance for the benefit of Glena was being denied on the ground that her Mexican divorce was invalid. Both parties testified and on submission of the matter the court found the marriage to be valid, and thereafter awarded temporary custody of the children to Glena and temporary child and spousal support to her.

On May 17, 1973, Raymond substituted himself in propria persona in place of Henrichsen. In such status, on March 8, 1974, he entered into a marital and property settlement agreement with Glena which recited they were married on November 19, 1955, and ever since had been husband and wife. He further stipulated the dissolution could be heard as an uncontested matter and that the settlement agreement could be incorporated in the interlocutory judgment. The interlocutory judgment was entered March 12, 1974, and the final judgment entered January 30, 1975.

On February 27, 1975, Raymond filed a motion to quash the service of summons, or in the alternative, for dismissal. The motion was denied and he appealed. This court affirmed the denial and in the process found the marriage valid.[1]

Petitions for rehearing and for a hearing before the California Supreme Court were denied as was a petition for writ of certiorari to the United States Supreme Court on February 22, 1977. (429 U.S. 1098 [51 L.Ed.2d 545].)

Having no place else to go, Raymond filed this action against Henrichsen May 10, 1977. A first amended com-

1. **In re the Marriage of Ferren** (1976) 2d Civil No. 47321.

plaint was filed July 26, 1978, with two causes of action alleging in essence that Henrichsen was guilty of breach of contract and malpractice by failing to file a motion to quash service in the first instance rather than filing a responsive pleading and making a general appearance. The failure was alleged to constitute a waiver of Raymond's right to file such a motion resulting in his inability to contest the validity of the marriage.

A third cause of action alleged fraudulent concealment of the fact that by making a general appearance a waiver resulted of Raymond's right to contest Glena's capacity to sue or to contest the court's jurisdiction over the subject matter.

A second amended answer was filed denying the allegations of all three causes of action and affirmatively alleging the statute of limitations as a defense.

After the matter finally became at issue on the pleadings, Henrichsen filed a motion for summary judgment contending that the legal malpractice was strictly a question of law, that the statute of limitations barred any action for breach of contract and negligence and that a different result would not have been obtained if a motion to quash had been utilized. Supplemental points and authorities filed subsequently contended the action was also barred by collateral estoppel arising from the prior dissolution and the statute of limitations based on lack of a written contract of employment.

Raymond filed a motion for partial summary judgment as to liability issues for malpractice and breach of contract. The trial court denied Raymond's motion and granted Henrichsen's motion for summary judgment, and judgment accordingly was entered November 24, 1980. This appeal ensued.

Raymond first contends that the minute order and the formal order granting summary judgment inadequately specified the grounds or basis for the order. Raymond cites no authority to support his contention other than a recommendation contained in California Continuing Education of the Bar, 2 California Civil Procedure Before Trial 310 (1978), that summary judgments identify the issues found to be without substantial controversy. The recommendation is not controlling.

Code of Civil procedure section 437, subdivision (c) specifies: "Such motion [summary judgment] shall be granted if all papers submitted show that there is **no** triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . ." (Emphasis added.) It follows that by granting the summary judgment the court determined that all issues were found to be without substantial controversy.

Furthermore, the court's refusal to grant Raymond's request for findings was proper. The court is without power to make findings of fact and conclusions of law in a summary judgment proceeding. **(Allis-Chalmers Corp.** v **City of Oxnard** (1981) 126 Cal.App.3d 814, 818 fn. 2.)

Secondly, Raymond contends there was no evidence the statute of limitations barred his complaint and to the contrary, the statute was tolled until July 1975 when he first discovered the negligence of his attorney.[2] Raymond relies on **Neel** v. **Magana, Olney, Levy, Cathcart & Gelfand** (1971) 6 Cal.3d 176, 194, for the principle that a "cause of action for legal malpractice does not accrue until the client discovers, or should discover, the facts establishing the elements of his cause of action."

The guidelines for effectively pleading delayed discovery are set forth in **Dujardin** v. **Ventura County Gen. Hosp.** (1973) 69 Cal.App.3d 350, at page 356: "In order to properly raise the issue of belated discovery, the plaintiff must state in his complaint when the discovery was made, the circumstances surrounding the discovery, and facts which show that the failure to make an earlier discovery was reasonable, justifiable and not a result of plaintiff's failure to investigate or to act."

Although the complaint and the declaration of Raymond in support of his opposition to the motion for summary judgment adequately allege the time of discovery and the circumstances surrounding the discovery, we conclude as a matter of law that the facts alleged are insufficient to show that his failure to make an earlier discovery was reasonable, justifiable and not a result of his failure to investigate or to act. The allegations in this res-

2. The applicable statute of limitations for legal malpractice was Code of Civil Procedure §339, subdivision 1, (**Alter v. Michael** (1966) 64 Cal 2d 480, 483), which provides a two year period. § 340.6 did not become effective until 1978.

pect are limited to the excuses that his lack of "formal legal training" prevented him from discovering the malpractice until he retained other counsel in July 1975 and that Henrichsen willfully and fraudulently concealed from him the facts of the malpractice.

The record does not give credence to Raymond's excuses. Raymond testified in his deposition that he began to have doubts as to Henrichsen's competency prior to the original order to show cause in August 1972. Thereafter, in May 1973 he substituted Henrichsen out as his attorney of record. On June 15,1973, he wrote a letter to the Client-Attorney Relationship Committee with the Ventura County Bar Association asserting that Henrichsen had (1) failed to act competently; (2) handled a legal matter without preparation adequate in the circumstances; (3) neglected a legal matter entrusted to him; (4) failed to represent a client zealously within the bounds of the law; (5) failed to seek the lawful objectives of his client through reasonable available means permitted by law; (6) concealed or knowingly failed to disclose that which he is required by law to reveal; (7) knowingly engaged in other legal conduct or conduct contrary to a disciplinary rule; and (8) received information clearly establishing a person other than his client has perpetrated a fraud upon a tribunal and did not reveal the fraud to the tribunal.

In response to the Bar Association's request for more detailed information, Raymond replied on June 29, 1973,[3]

3. Raymond's letters of June 15 and 29, 1973, Exhibits M and N to defendant's points and authorities supporting his motion for summary judgment, were authenticated by Raymond at pages 88-89 of his deposition and made exhibits thereto. (Evid. Code §1400, §1401.)

in such particulars as to be obvious that he had been aware for some time of facts suggesting legal malpractice which should have triggered further investigation on his part. (**McGee** v. **Weinberg** (1979) 97 Cal.App.3d 798, 803.) Yet despite his self-professed lack of "formal legal training" he did nothing for over two years or until July 1975 before engaging other legal counsel.

We conclude Raymond did not exercise reasonable diligence to discover timely the alleged malpractice. (**Sanchez** v. **South Hoover Hospital** (1976) 18 Cal.3d 93, 101.) Furthermore, since the fraud cause of action arises from the same basic set of facts as that based on negligence, that cause of action is also barred by the applicable (three year) statute of limitations. (Code Civ. Proc., §338, subd. (4).)

Although our conclusion with respect to the statute of limitations is sufficient to support affirmance of the judgment, one other basis warrants comment. Raymond's basic complaint is that by failing to file a motion to quash, he was deprived of his right to contest the validity of the marriage which in turn was determinative of the jurisdiction of the court and capacity of Glena to sue. However, the same issue was raised on numerous occasions and litigated in the dissolution proceeding.

As noted by this court at page 10 of the slip opinion in **In re the Marriage of Ferren, supra:** "Appellant sought the jurisdiction of the court for the purpose of having his marriage declared a nullity (response to petition for dis-

solution of marriage), and on the order to show cause (August 11, 1972) urged the invalidity of his marriage offering his own testimony in that respect and a letter (April 11, 1956) from the Veteran's Administration, on which issue, after hearing the evidence, the court ruled adversely to him; subsequently he filed notice of appeal therefrom. On numerous occasions on various orders to show cause, motions, points and authorities, etc., he continued to raise the issue."

It is apparent that Raymond was not deprived of his right to contest the validity of the marriage even though trial of the issue was by a general appearance rather than by motion to quash. A choice of procedural strategies is not a proper ground to hold an attorney liable for malpractice. (**Banerian** v. **O'Malley** (1974) 42 Cal.App.3d 604, 613, citing 1 Witkin, Cal. Procedure (2d ed. 1970) § 150, p. 161.) Furthermore, there is no showing that the decision as to the validity of the marriage would have been any different had it been litigated on a motion to quash. To maintain his action for malpractice, Raymond must show the result would have been in his favor had Henrichsen filed the motion to quash. (**Campbell** v. **Magana** (1960) 184 Cal.App.2d 751, 754.)

In view of our conclusion heretofore expressed there is no reason to consider Raymond's other contentions. Henrichsen's contention that Raymond's appeal is frivolous is tempting but rejected.

The judgment is affirmed.
NOT TO BE PUBLISHED.

KLEIN, P.J.

We concur:

LUI, J.

DANIELSON, J.

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PETITION FOR REHEARING DENIED

CLAY ROBBINS, Clerk

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4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

July 25 1982

I have this day filed Order [illegible]

In re: 2nd Civ. No. 62286

Ferren

vs.

Heidrichsen

Respectfully,

Clerk

[illegible]

PROOF OF SERVICE

STATE OF CALIFORNIA)
ss:
COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 4075 Agate, Riverside, California 92509.

On September 27,1982, I served the within Petition For Writ of Certiorari on the interested parties in said action, by placing a true copy in each of three (3) sealed envelopes, with postage thereon fully prepaid, in the United States mail at San Bernardino, California, addressed as follows:

Clerk Court of Appeal	Clerk of Superior Court
2nd Appellate District	County of Ventura
3580 Wilshire Blvd., #301	800 S. Victoria Ave.
Los Angeles, Ca., 90010	Ventura, Ca., 93009

William B. Ritner
A Professional Law Corporation
550 St. Charles Drive, #101
Thousand Oaks, Ca., 91360

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on September 27, 1982, at Riverside, California.

JACK GALLAGHER